IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.276 of 1996

Reserved on:23.11.2007.

Decided on:December 27, 2007.

Durga Devi ***.....Appellant.***

VERSUS

Baini Parsad ***.....Respondent.***

Coram

The Hon'ble Mr.Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] Yes

For the Appellant: **Mr.K.D.Sood with Mr.Rajnish K. Lall, Advocates.**

For the Respondent: **Mr.H.K.Paul, Advocate.**

Kuldip Singh, Judge:

The plaintiff is in appeal against the judgment, decree dated 31.5.1996 passed by learned Additional District Judge, Kullu in Civil Appeal No.9/92, modifying judgment, decreed dated 18.1.1992 passed by learned Senior Sub Judge, Kullu in Civil Suit No.70 of 1988.

2. The appellant filed a suit for possession of land measuring 11 biswansis comprised in Khasra No.994/1-A/1 as per *Tatima* by demolition of structure raised thereon, in Phati Dhalpur Kothi Maharaja, Tehsil and District Kullu and for permanent prohibitory injunction restraining respondent from interfering on disputed land and

[1] ***Whether the reporters of the local papers may be allowed to see the Judgment? Yes***

other land owned by appellant. The further facts are that Kanwar Kuber Singh on 1.12.1971 vide registered sale deed Ext.P-1 sold land measuring 6 biswas comprised in Khasra No.994/1-A to Moti Ram, Mani Ram and Atma Ram. On partition of this land, half portion of land measuring 3 biswas on the northern side fell in the share of Atma Ram and remaining half situated on the southern side fell in the share of Moti Ram and Mani Ram. On the death of Atma Ram his son Khuru inherited his estate and sold the aforesaid share vide sale deed dated 4.8.1986 Ext.P-3 to appellant. Moti Ram and Mani Ram sold their share on 5.8.1980 to Ses Ram and Ses Ram sold that land to Ghamandu vide sale deed dated 25.4.1985 Ext.P-5. Ghamaudu laid plinth over that land which was purchased by him from Ses Ram. Ghamandu ultimately vide sale deed dated 9.9.1987 sold land purchased by him from Ses Ram to appellant along with construction raised by him up to plinth level. This 3 biswas of land comprised in Khasra No.994/1-A is in dispute between the parties.

3. On the western side of the land which was purchased by appellant from Ghamandu, the appellant has her Abadi on land measuring 6 biswas which is shown by Khasra No.994-1/D as per field map Ext.PW-10/A. The case of the appellant is that respondent has encroached 11 biswansis of her land comprised in Khasra No.994/1-A/1 as shown in *Aks Shajra Tatima* Ext.P-9 and Ext.OW-1/A prepared on the spot and report of the Tehsildar Ext.PW-12/B.

4. The respondent is owner in possession of land measuring 6 biswas comprised in Khasra No.994/1-D. The respondent in the absence of appellant has encroached the suit land on the western side to the extent of 1 Karam x 11 Karams (11 biswansis) in August 1987. The respondent has constructed his house on his own land but in August 1987 he has extended his construction by raising verandah on a portion of the suit land by laying pillars. The appellant requested the respondent not to raise any construction on the suit land, he was given telegraphic notice also. On the request of appellant, Collector Kullu appointed Hotam Ram PW-10 to demarcate the suit land who demarcated the suit land on 29.9.1987 and found encroachment of the respondent on the suit land to the extent of 11 biswansis vide field map Ext.P-9. On these pleas, the appellant filed the suit.

5. The respondent contested the suit by taking preliminary objections of maintainability, *Tatima* Ext.P-9 has been prepared by retired Kanungo and is incorrect, the suit has not been properly valued for the purposes of Court fee. The claim of the appellant on merits is without any basis and unwarranted. The ownership of the appellant on land comprised in Khasra No.994/1-A measuring 6 biswas is not denied but correctness of the field map Ext.PW-10/A was denied. According to the respondent, the land comprised in Khasra No.994/1 measuring 6 biswas had come to his ownership and possession by way of exchange along with the land in dispute vide registered deed

dated 30.10.1979 from one Smt.Dropti Devi who was in possession thereof. The respondent has constructed a house on the suit land including the land in dispute with verandah and the construction was completed in all respects in September 1986 when neither appellant nor her husband raised any objection.

6. The construction has been raised after obtaining permission from Municipal Committee, Kullu and Town & Country Planning Department, Kullu. It has been alleged that respondent is owner in possession of the suit land. He has submitted that husband of the appellant has encroached land of the respondent. The appellant filed replication in which she reiterated her case as set up in the plaint. The following issues were framed by the learned trial Judge:-

1. *Whether the dfdt has encroached over the suit land, as alleged? If so, to what extent? OPP*
2. *Whether the suit is not maintainable, as alleged? OPD*
3. *Whether the suit has been properly valued for the purpose of Court fee? OPP*
4. *Relief.*

7. On 18.1.1992 the learned Senior Sub Judge, Kullu decreed the suit of the appellant by declaring her owner in possession of the suit land and returned the findings that respondent has encroached upon the suit land to the extent of 11 biswansis as per

field map Ext.P-9 and field map Ext.OW-1/A. It has been held that appellant is entitled to possession of the land measuring 11 biswansis by demolition of the construction of the respondent and the respondent was restrained from interfering in the ownership and possession of the appellant on rest of the suit land, accordingly a decree of possession and permanent prohibitory injunction was passed in favour of the appellant and against the respondent. The respondent filed appeal against the decision dated 18.1.1992, the learned Additional District Judge, Kullu allowed the appeal on 31.5.1996 and modified the judgment, decree of the trial Court by holding that appellant is not entitled for the possession of 11 biswansis of land comprised in Khasra No.994/1-A/1, Khasra No.724/1192, however, it has been held that appellant is entitled for a decree of compensation at the market rate prevalent at the time of filing of the suit which was assessed at Rs.5500. The appellant was also held entitled to interest at the rate of 12% per annum on the aforesaid amount of Rs.5500 from the date of filing of the suit till realization. In this way, the plaintiff is in second appeal against the judgment, decree dated 31.5.1996.

8. The appeal has been admitted on the following substantial questions of law:-

i) *Whether in view of the findings of the Courts below in issues No.1 and 2 that the plaintiff was the owner of the property and the defendants had unlawfully encroached upon the land of the plaintiff and despite protests*

and raised objection, the decree for possession could be denied to the plaintiff?

ii) *Whether on the material on record and the facts and circumstances of the case compensation of Rs.7500/-(sic) was a just and adequate relief to the plaintiff?*

iii) *Whether the findings of the Courts below are vitiated being based on inadmissible oral and documentary evidence and misreading and misconstruction of the evidence?*

9. I have heard Mr.K.D.Sood, learned counsel for the appellant, Mr.H.K.Paul, learned counsel for the respondent and gone through the record. Mr.Sood has submitted on behalf of the appellant that the appellant has proved her ownership on the suit land, she has also proved that respondent has encroached 11 biswansis of land of the appellant. The respondent has not proved any title on the encroached land. Therefore, the lower appellate Court has erred in not restoring possession of the encroached land to the appellant and awarding him alleged cost of the land. The appellant is entitled to restoration of the encroached land as well as judgment and decree as passed by the learned Senior Sub Judge. On behalf of the respondent, it has been submitted that substantial justice has been done by the learned lower appellate Court in awarding cost of the encroached land to the appellant. The construction was raised by the respondent much before the filing of the suit. The learned counsel for the respondent

has supported the impugned judgment, decree and has also pressed Section 51 of the Transfer of Property Act in support of his submissions.

SUBSTANTIAL QUESTIONS OF LAW NO.1 TO 3:

10. The substantial questions of law No.1 to 3 are inter-connected and, therefore, these are being disposed of collectively. The learned Senior Sub Judge has found that respondent has encroached 11 biswansis of land of the appellant and, therefore, a decree of possession for 11 biswansis of land by way of demolition of structure raised by respondent was passed in favour of appellant and decree of permanent prohibitory injunction with respect to the rest of the suit land. The lower appellate Court has recorded a specific finding that plaintiff has been able to prove her claim as set out in the plaint qua the encroachment made by the defendant over a portion of the suit land and there is no reason to disagree with these findings of the learned trial Court in this regard. However, instead of decree by way of demolition of the structure raised on encroached land, the lower appellate Court has awarded cost of the encroached land to the appellant by way of compensation. The lower appellate Court in awarding compensation has relied on ***R.S.Muthuswami Gounder*** *Versus* ***V.A.Annamalai and others, AIR 1981 Madras 220.***

11. The learned counsel for the respondent has also submitted that the construction was raised by the respondent before the filing of the suit by appellant. A perusal of the written statement would show that respondent has not taken any plea of estoppel,

acquiescence and waiver so as to disentitle the appellant actual possession of the encroached land and instead only compensation of the encroached land. There is no issue of estoppel, acquiescence and waiver for refusing possession of the encroached land to the appellant. The issue No.2 of maintainability of the suit is based upon the plea of the respondent in the written statement that suit is not maintainable as the plaintiff is neither in possession nor owner of the land in dispute. The respondent has rather pleaded that he is owner in possession of the land in dispute and appellant has no concern with it. The lower appellate Court has held that restoration of possession by way of demolition of structure is harsh, oppressive and inequitable and not at all warranted in the ends of justice and fair play. He has also held that the construction on the encroached portion was raised before the filing of the suit and, therefore, the appellant is not entitled to decree of possession by way of demolition of structure. The aforesaid reasons, which have been given by lower appellate Court in refusing possession to appellant by way of demolition of structure on encroached land, in the facts and circumstances of the case, are not available to the respondent. It is the case of the appellant that she had been requesting the respondent not to raise construction on her land but despite that respondent has raised the construction illegally. The respondent has taken the plea in the written statement that appellant has no connection with the suit land and respondent is owner in possession of the suit land. It has come on record that appellant objected the construction of respondent when it was being raised, she issued telegraphic notice Ext. PW-18/A dated 22.9.1987 to respondent

for stopping construction. The respondent has not taken the pleas of estoppel, acquiescence and waiver against the appellant. In ***R S Muthuswami Gounder's case (supra),*** the defence of first defendant was that he raised construction under bonafide belief that the suit property belonged to him and nearly 2 ½ years had elapsed after the construction of the buildings by the first defendant and no objection was raised by the plaintiff. The conduct of the plaintiff would clearly show that he has acquiesced in the acts of the first defendant. In those circumstances, instead of possession compensation was granted to the plaintiff at the prevalent market rate. In the present case, there is no such defence of the respondent, rather the evidence has come on record that appellant was requesting the respondent not to raise construction on the suit land. Therefore, ***R S Muthuswami Gounder's case (supra)*** relied upon by the learned lower appellate Court in awarding compensation to the appellant is not applicable in the facts and circumstances of the present case.

12. The parties were not put to issue on the point of estoppel, acquiescence and waiver etc. during trial of the suit. The respondent, as a matter of fact, was required to prove estoppel, acquiescence and waiver etc. against appellant so as to disentitle the appellant recovery of possession by way of demolition of structure raised by respondent on the land of the appellant. In ***Siromani*** *Versus* ***Hemkumar and others, A.I.R.1968 SC 1299***, the question of validity

of deed because of acquiescence was before the Apex Court. In Para-5 of the judgment the Apex Court has observed as follows:-

> "… … But the contention put forward on behalf of the respondents is that by signing the document, Ex.D-4 Mst.Subhagwati acquiesced in the division of the properties between her sons without claiming any share for herself and it must consequently be taken that Mst.Subhagwati relinquished her share.
> … … There is no issue on the question of acquiescence. We are accordingly unable to accept the argument of the respondents that there was acquiescence on the part of Mst.Subhagwati or that she relinquished her share in favour of the other coparceners and the finding of the High Court on this point is erroneous."

In the present case also, there is no issue of estoppel, acquiescence and waiver etc. debarring the appellant recovery of possession of encroached land on which respondent has unauthorizedly raised construction, therefore, appellant cannot be stopped from recovery of possession by way of demolition of structure raised on the encroached land by the respondent. In ***Maola and others*** *Versus* ***Bahoru, A.I.R. 1923 Allahabad 567,*** it has been held that a person without right building in spite of objection by owner then doctrine of equitable estoppel will not apply, similar view has been taken in ***Mahdeo Patel*** *Versus* ***Narayan and others, A.I.R. 1927 Nagpur 348*** where suit was

filed after two years. In ***T.Prasad and others*** *Versus* ***P.D. Punnoose and another, A.I.R. 1995 Kerala 157,*** it has been held as follows:-

> "... ...In a case where the defendant has trespassed upon the plaintiff's property and caused mischief or destruction or constructed any structures plaintiff who is entitled to recover possession of the land can always seek for mandatory injunction. Just like an encroacher who puts up any construction on another's land not being entitled to it has to remove the same, so also as in the present case where the boundary wall was destroyed by the intentional and deliberate acts of the defendants plaintiffs cannot be denied of the relief of mandatory injunction. After having destroyed plaintiff's property defendants cannot take the stand that monetary compensation offered would be adequate. As owners of the property plaintiffs' desire to see the property restored to its original condition cannot be termed as unreasonable. Nor can it be held to be Shylockian approach. In a case where plaintiff sought mandatory injunction and established his case for the same it cannot be refused ordinarily and monetary compensation awarded."

The learned counsel for respondent has submitted that construction raised by respondent is protected under Section 51 of the Transfer of Property Act. Section 51 of Transfer of Property Act will apply when a person makes improvements under bonafide defective title. It has

been proved on record that respondent encroached the land of appellant and raised construction despite objections of the appellant. The construction raised by respondent is not bonafide. The appellant cannot be compelled to accept compensation in these circumstances. Section 51 of the Transfer of Property Act is not applicable in the present case. In ***R.S. Maddanappa*** *Versus* ***Chandramma and another, A.I.R. 1965 SC 1812,*** the Apex Court has held as follows:-

> "… … No man who, knowing fully well that he has no title to property, spends money on improving it can be permitted to deprive the original owner of his right to possession of the property except upon the payment for the improvements which were not effected with the consent of that person. In our view, therefore, neither was defendant No.1 estopped from claiming possession of half share of the properties nor can she be made liable to pay half the costs of improvements alleged to have been made by the second defendant."

13. The appellant has proved on record that respondent has raised unauthorized construction on a part of land owned by appellant despite her objections. The appellant was not put to trial so as to debar her recovery of possession of the encroached land by way of estoppel, acquiescence and waiver etc., in fact, no such pleas have been taken by the respondent in the written statement. The lower appellate Court has erred in awarding compensation to the appellant of the

encroached land instead of actual possession thereof. The impugned judgment, decree of lower appellate Court to this extent is not sustainable. The substantial questions of law No.1 to 3 are decided in favour of the appellant and against the respondent.

14. No other point was urged.

15. The result of the above discussion, the appeal is allowed. Judgment and decree passed by lower appellate Court awarding compensation to appellant instead of actual physical possession of the encroached land by way of demolition of structure raised by respondent thereon is set aside. The judgment and decree dated 18.1.1992 passed by learned Senor Sub Judge, Kullu in Civil Suit No.70 of 1988 are restored. No costs.

December 27, 2007. ***(Kuldip Singh)***
(soni) ***Judge***